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Utah Court of Appeals

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Case No. 20090934-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/ Appellee,

vs.

Kelly Tyson Davis,
Defendant/ Appellant.

Brief of Appellee

Appeal from convictions for retail theft (with priors), in the Second
Judicial District Court of Utah, Weber County, the Honorable Scott M.
Hadley presiding.

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FILED
UTAH APPELLATE COURTS

AUG 05 2010

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Case No. 20090934-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Kelly Tyson Davis,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for retail theft (with priors), a third degree felony. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2009).

STATEMENT OF THE ISSUE

Did the prosecutor breach the plea agreement when he recommended that Defendant serve a prison term? If so, did the trial court plainly err or was counsel ineffective for not noting and addressing the breach?

Standard of Review. To establish plain error, a defendant must show that “(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful.” *State v. Alfatlawi*, 2006 UT App 511, ¶ 12, 153 P.3d 804. An ineffective assistance of counsel claim raised for the first time on appeal presents a

question of law reviewable for correctness. *See State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

No constitutional provisions, statutes, or rules are dispositive in this case.

STATEMENT OF THE CASE

The State charged Defendant with retail theft (with priors), a third degree felony, in violation of Utah Code Ann. § 76-6-602 (West 2009).¹ Defendant pled guilty as charged. R17-18; R19-25 (plea statement); R63 (transcript of plea hearing). In exchange, the prosecutor agreed to recommend that any sentence in this case run concurrently with Defendant's sentence in a Davis County case. R23.

At sentencing, the prosecutor made the promised recommendation. R62:7. But the prosecutor clarified that he had not "agree[d] to recommend that whatever [the Davis County] sentence was, it would be the sentence we'd recommend in this case." *Id.* Noting that Defendant "just keeps committing offenses, even when he's charged and on probation for other offenses," the prosecutor recommended prison. R62:10.

¹ The State cites to the current version of the relevant statutes except where changes in the statutes may be relevant to the claims on appeal.

After hearing from both parties, the court imposed an indeterminate prison term of zero to five years, ordered that Defendant be given credit for time served, and ordered that the sentence run concurrently with any other sentence Defendant was serving. R62:12; *see also* R34-35.

Between the date of sentencing and the date that judgment was filed, Defendant sent the court a letter alleging that the prosecutor had breached the plea and asking to withdraw his plea. *See* R32-33. The trial court declined to consider it, explaining that the letter was an improper ex parte communication and advising Defendant that requests for orders from the court must be made by motion and with the involvement of all parties. *See* R36.

STATEMENT OF THE FACTS

Defendant entered a 7-Eleven, took some items that were for sale, and left without paying for them. R63:3. Defendant had two prior convictions for theft. R63:3-4.

SUMMARY OF ARGUMENT

The prosecutor did not breach the plea agreement. The prosecutor promised only to recommend that the sentence in this case run concurrently with the sentence in Defendant's Davis County case. The prosecutor made that recommendation. But the prosecutor did not agree to recommend a jail sentence and/or probation, nor did he agree to stand silent on the nature of the sentence. Because the prosecutor

did not breach the plea agreement, Defendant cannot prevail on either his plain error or his ineffective assistance of counsel claim.

ARGUMENT

DEFENDANT'S PLAIN ERROR AND INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS FAIL BECAUSE THE PROSECUTOR DID NOT BREACH THE PLEA AGREEMENT

Defendant claims that the prosecutor breached the plea agreement when he recommended a prison sentence. Br. Appellant at 10-11. Defendant observes that when he entered his guilty plea, "the prosecutor agreed to recommend a concurrent jail sentence." Br. Appellant at 10. But, he argues, "At sentencing the prosecutor initially stuck with that recommendation, telling the court that the [S]tate was recommending a concurrent jail sentence. Yet midway through sentencing, the prosecutor changed his recommendation and requested the Court sentence [Defendant] to prison." Br. Appellant at 10 (record citations omitted).

Defendant concedes that he did not raise this claim at sentencing when the alleged breach occurred and observes that this would normally preclude review of

the matter on appeal. *See* Br. Appellant at 11. Defendant, however, asserts that he can establish plain error and ineffective assistance of trial counsel. *See id.*²

A. The trial court did not plainly err for proceeding with sentencing after the prosecutor recommended prison time.

When a prosecutor breaches his promise and the defendant objects, the defendant is entitled to a remedy, which in some cases may be specific performance of the plea and in some cases the opportunity to withdraw his plea. *Santobello v. New York*, 404 U.S. 257, 261-63 (1971) (“[T]he adjudicative element inherent in accepting a plea of guilty[] must be attended by safeguards to insure the defendant

² Alternatively Defendant asserts that he may have preserved his claim when he sent the court a pro se letter alleging that the prosecutor had breached the plea. Br. Appellant at 11. “He contends that this letter preserved the issue in the trial court, not unlike a motion for new trial.” *Id.* Defendant has not explained why the trial court should have treated an ex parte communication from a represented defendant as if it were a motion for a new trial, nor has he discussed the standard for a new trial. He has cited to no authority for his claim. His claim is thus inadequately briefed, and this Court should not review it. *See State v. Lee*, 2006 UT 5, ¶ 22, 128 P.3d 1179 (“An adequately briefed argument contain[s] the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. We have held that, to be adequate, briefs must provide “meaningful legal analysis.”) (citing Utah R. App. P. 24(a)(9)) (additional citation and internal quotation omitted).

Moreover, a represented client “generally has no authority to file pro se motions, and the court should not consider them.” *State v. Wareham*, 2006 UT App 327, ¶ 33, 143 P.3d 302 (citation and internal quotation omitted).

what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”); *see also State v. Smit*, 2004 UT App 222, 95 P.3d 1203, ¶ 17 (“[W]hen a plea agreement is breached by the prosecutor, the proper remedy is either specific performance of the plea agreement or withdrawal of the guilty plea both at the discretion of the trial judge.”).

But where the defendant does not object to a breach and where the error is therefore not properly preserved, the authority of the appellate courts to remedy the error is “strictly circumscribed.” *Puckett v. United States*, 129 S.Ct. 1423, 1428 (2009) (addressing unpreserved claim that prosecutor breached plea). In the federal courts, relief is available only where the defendant can show plain error, i.e., (1) that an error or defect exists, (2) that the error is clear or obvious, (3) and that the error affected the substantial rights of the defendant. *Id.* at 1429.³

³ In the federal courts, plain error review involves an additional or fourth step or prong. “Fourth and finally, if the above three prongs are satisfied, the court of appeals has the *discretion* to remedy the error—discretion which ought to be exercised only if the error “seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Puckett*, 129 S.Ct. at 1429 (internal quotation and citation omitted) (emphasis in original).

Similarly, in Utah's appellate courts, appellate review of unpreserved claims requires a showing of plain error or some other exception to the preservation rules. "'Under ordinary circumstances, [Utah courts] will not consider an issue brought for the first time on appeal unless the trial court committed plain error or exceptional circumstances exist.'" *State v. Pinder*, 2005 UT 15, ¶ 45, 114 P.3d 551 (quoting *State v. Nelson-Waggoner*, 2004 UT 29, ¶ 16, 94 P.3d 186). To establish plain error, a defendant must show that "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful." *State v. Alfatlawi*, 2006 UT App 511, ¶ 12, 153 P.3d 804.

Proceedings below. Here, in exchange for Defendant's guilty plea, the prosecutor agreed to recommend that Defendant's sentence run concurrently with his sentence in a Davis County case. See R23 (plea statement). That was the prosecutor's only agreement. See *id.*; see also R63 (transcript of plea hearing). The

trial court accepted the plea and ordered that Adult Probation and Parole (AP&P) prepare a pre-sentence investigation report addendum (PSI Add.). R63:4.⁴

At sentencing, the court noted that in a PSI prepared two months earlier, AP&P had not recommended prison. R62:8. But, the court observed, in the PSI Addendum following the instant offense, AP&P had recommended prison. *Id.* The

⁴ In its report, AP&P recommended that Defendant be committed to prison for an indeterminate prison term of zero to five years. *See* PSI Add. at 2. The report noted that Defendant was “currently incarcerated in the Davis County Jail, and is on probation with Adult Probation and Parole.” *Id.* The report also stated that on July 2, 2009, [Defendant] was sentenced in the Second District Court, Farmington[,] for two separate felony offenses (Cases 081700952 and 081701935).” *Id.* The charges in these cases were possession of a controlled substance, a third degree felony, and theft, a third degree felony. *Id.* The report referenced Defendant’s “significant criminal history,” which included three felony convictions and several misdemeanor convictions. *Id.* at 3. It continued, “[Defendant’s] supervision history as an adult includes both formal and informal probation. From 2005 to 2007 he was supervised on probation through AP&P, and in 2007 his probation was terminated unsuccessfully. In addition to being on probation with AP&P, he is also on probation through Ogden District Court for a felony offense.” *Id.* The report also clarified that when his probation was revoked and restarted in 2007, it was “restarted with zero tolerance.” *Id.* at 6.

The report further stated that Defendant had acknowledged his addiction to methamphetamine. *Id.* at 3. But Defendant “did not qualify for the DORA [Drug Offender Reform Act] Program, as his Criminal History Matrix indicates a Utah State Prison Commitment.” *Id.*

prosecutor explained that the new recommendation reflected a change in the sentencing matrix, which changes with each conviction. *Id.*

The prosecutor acknowledged that he had agreed to recommend that the sentence in this case run concurrently with the sentence on the Davis County case. R62:7. But, he clarified, "We didn't agree to recommend that whatever their sentence was, it would be the sentence we'd recommend in this case." *Id.* The prosecutor then expressed his belief that AP&P's recommendation for prison was appropriate, explaining, "He's been given the chan[ce] of probation before and was terminated unsuccessfully." *Id.* at 10. The prosecutor elaborated, "At the time, after he committed the offense that he's apparently on court probation for, he committed this offense, so he just keeps committing offenses, even when he's been charged and on probation for other offenses." *Id.*

The court imposed an indeterminate prison term of zero to five years, gave Defendant credit for time served, and ordered that his sentence run concurrently with any other sentence that he was then serving. *Id.* at 12.

Analysis. The prosecutor did not breach the plea agreement. The prosecutor agreed to recommend that Defendant's sentence run concurrently with the sentence in his Davis County case. R23. The prosecutor made that recommendation. *See* R62:7. Moreover, while the trial court was not bound to follow the recommendation, the court nevertheless exercised its discretion to run the prison

sentence in this case concurrently with any other sentence Defendant was serving. See R62:12.

The prosecutor did not agree to recommend the same sentence as that imposed in the Davis County case. See R23. He did not agree to recommend a jail term with probation. See *id.* He did not agree to stand silent on the nature of the sentence. See *id.* Thus, the prosecutor did not breach the plea agreement when he recommended that Defendant receive a prison sentence.

For this reason, Defendant cannot show that the trial court erred when it failed to sua sponte find that the prosecutor had breached the plea or for not granting Defendant some other kind of relief. Defendant cannot show any error, let alone obvious and prejudicial error.

Indeed, Defendant's argument rests on an erroneous assumption. Defendant's argument assumes that a concurrent sentence is an identical sentence and that to recommend a concurrent sentence is to recommend that an identical sentence run concurrently. Defendant's claim is without a basis in logic or law.

B. Defense counsel was not ineffective for not arguing that the prosecutor had breached the plea agreement.

"To establish ineffective assistance of counsel, a defendant must demonstrate both that 'counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgment,' and that 'counsel's deficient performance was prejudicial.'" *State v. Perry*, 2009 UT App 51, ¶ 11, 204 P.3d 880

(quoting *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984))). “To show prejudice ..., the defendant bears the burden of proving that counsel’s errors actually had an adverse effect on the defense and that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* (internal quotation and citations omitted).

Inadequate briefing. Defendant contends, in passing, that he can show not only plain error, but also ineffective assistance of counsel. *See* Br. Appellant at 11. While he has briefed his plain error claim, he has not briefed — much less adequately briefed — his ineffective assistance claim. Therefore, this Court therefore should not review it. *See* Utah R. App. P. 24(a)(9) (requiring that appellant set forth an argument that “contain[s] the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on”); *State v. Thomas*, 1999 UT 2, ¶ 11, 974 P.2d 269 (stating that “[a] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research”) (internal quotation marks and citations omitted).

Analysis. In any case, Defendant cannot show that trial counsel was ineffective for not objecting to a breach, because no breach occurred. The prosecutor fulfilled the promises made in the plea agreement. He recommended that the sentence in this case run concurrently with the sentence in the Davis County case. R62:7. But the prosecutor did not promise to recommend jail and/or probation or to stand silent on the nature of the sentence. R23.

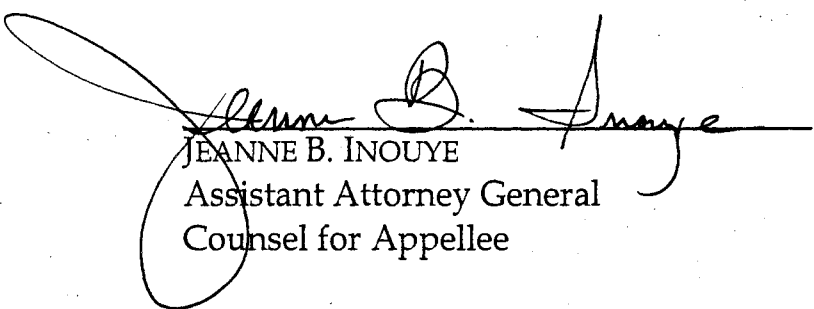
Because the prosecutor did not breach the plea, defense counsel did not perform deficiently for not objecting to the prosecutor's recommendation of prison. *See State v. Whittle*, 1999 UT 96, ¶ 34, 989 P.2d 52 (Counsel's failure "to make motions or objections [that] would be futile if raised does not constitute ineffective assistance.") (quotations and citations omitted). Moreover, because the prosecutor did not breach the plea, defendant cannot demonstrate prejudice. He cannot show that there is a reasonable probability that, had counsel objected to the prosecutor's recommendation, the result of the proceeding would have been different.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted August 5, 2010.

MARK L. SHURTLEFF
Utah Attorney General



JEANNE B. INOUE
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on August 5, 2010, two copies of the foregoing brief were

☒ mailed ☐ hand-delivered to:

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A digital copy of the brief was also included: ☒ Yes ☐ No

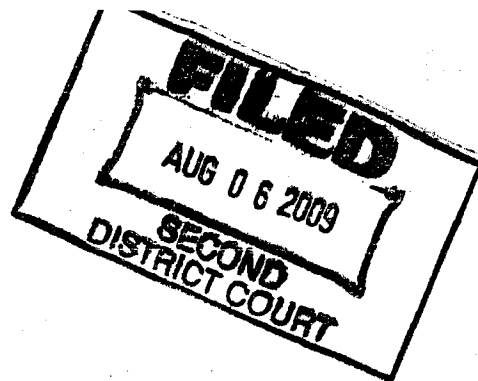
Melissa Arger

Addenda

Addendum A

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2562 Washington Boulevard
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AUG 12 2003



IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

Kelly Davis

Defendant.

STATEMENT OF DEFENDANT
IN SUPPORT OF GUILTY PLEA
AND CERTIFICATE OF COUNSEL

Case No. _____

JUDGE MDL

I, _____, hereby acknowledge and certify that I
have been advised of and that I understand the following facts and rights;

NOTIFICATION OF CHARGES

I am pleading guilty (or no contest) to the following crimes:

| CRIME & STATUTORY PROVISION | DEGREE | PUNISHMENT MIN/MAX AND/OR |
|--------------------------------|-----------------------|------------------------------|
| A. <u>Retail Theft</u> | <u>3rd</u> | <u>0-5 / \$5,000</u> |
| B. _____ | _____ | _____ |
| C. _____ | _____ | _____ |
| D. _____ | _____ | _____ |
| E. _____ | _____ | _____ |
| F. _____ | _____ | _____ |

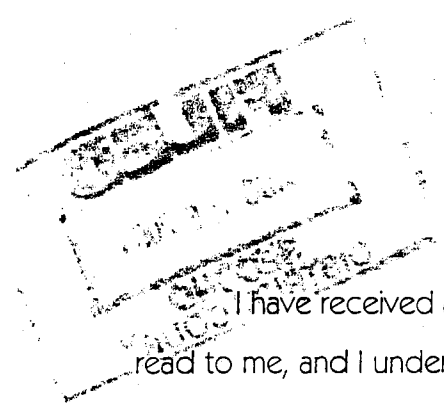
STATEMENT OF DEFENDANT IN SUPPORT OF GUILTY



CD29481445

pages: 7

091901063 DAVIS KELLY TYSON


I have received a copy of the (Amended) Information against me. I have read it, or had it read to me, and I understand the nature and the elements of the crime(s) to which I am pleading guilty (or no contest).

The elements of the crime(s) to which I am pleading guilty (or no contest) are:

on or about 10/6/68, def. did knowingly take possession of, conceal, or carry away, any merchandise that was held for sale in a retail mercantile establishment, with intention of retaining such merchandise w/o paying the retail value thereof, and has been twice previously convicted of any theft or burglary w/ intent to commit theft.

I understand that by pleading guilty, I will be admitting that I committed the crimes listed above. (Or, if I am pleading no contest, I am not contesting that I committed the foregoing crimes). I stipulate and agree (or, if I am pleading no contest, I do not dispute or contest) that the following facts describe my conduct and the conduct of other persons for which I am criminally liable. These facts provide a basis for the Court to accept my guilty (or no contest) pleas and prove the elements of the crime(s) to which I am pleading guilty (or no contest):

See above

WAIVER OF CONSTITUTIONAL RIGHTS

I am entering these pleas voluntarily. I understand that I have the following rights under the constitutions of Utah and the United States. I also understand that if I plead guilty (or no contest) I will give up all the following rights:

COUNSEL: I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the Court at no cost to me. I understand that I might later, if the Judge determined that I was able, be required to pay for the appointed lawyer's service to me.

I have not waived my right to counsel. If I have waived my right to counsel, I have done so knowingly, intelligently, and voluntarily for the following reason:

If I have waived my right to counsel, I certify that I have read this statement and that I understand the nature and elements of the charges and crimes to which I am pleading guilty (or no contest). I also understand my rights in this case and other cases and the consequences of my guilty (or no contest) plea(s).

If I have *not* waived my right to counsel, my attorney is Ryan Rushell. My attorney and I have fully discussed this statement, my rights, and the consequences of my guilty (or no contest) plea(s).

JURY TRIAL. I know that I have a right to a speedy and public trial by an impartial (unbiased) jury and that I will be giving up that right by pleading guilty (or no contest).

CONFRONTATION AND CROSS-EXAMINATION OF WITNESSES. I know that if I were to have a jury trial, (a) I would have the right to see and observe the witnesses who testified against me and (b) by my attorney, or myself if I waived my right to an attorney, would have the opportunity to cross-examine all of the witnesses who testified against me.

RIGHT TO COMPEL WITNESSES. I know that if I were to have a jury trial, I could call witnesses if I choose to, and I would be able to obtain subpoenas requiring the attendance and testimony of the witnesses. If I could not afford to pay for the witnesses to appear, the State would pay those costs.

RIGHT TO TESTIFY AND PRIVILEGE AGAINST SELF-INCRIMINATION. I know that if I were to have a jury trial, I would have the right to testify on my own behalf. I also know that if I choose not to testify, no one could make me testify or make me give evidence against myself. I also know that if I choose not to testify, the jury would be told that they could not hold my refusal to testify against me.

PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF. I know that if I do not plead guilty (or no contest), I am presumed innocent until the State proves that I am guilty of the charged crime(s). If I choose to fight the charges against me, I need only plead "not guilty" and my case will be set for a trial. At a trial, the State would have the burden of proving each element of the charge(s) beyond a reasonable doubt. If the trial is before a jury, the verdict must be unanimous, meaning that each juror would have to find me guilty.

I understand that if I plead guilty (or no contest), I give up the presumption of innocence and will be admitting that I committed the crime(s) stated above.

APPEAL. I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand that I am giving up my right to appeal my conviction if I plead guilty (or no contest).

I know and understand that by pleading guilty, I am waiving and giving up all the statutory and constitutional rights as explained above.

CONSEQUENCES OF ENTERING A GUILTY (OR NO CONTEST) PLEA

POTENTIAL PENALTIES. I know the maximum sentence that may be imposed for each crime to which I am pleading guilty (or no contest). I know that by pleading guilty (or no contest) to a crime that carries a mandatory penalty, I will be subjecting myself to serving a mandatory penalty for that crime. I know my sentence may include a prison term, fine, or both.

I know that in addition to a fine, an eighty-five percent (85%) surcharge will be imposed. I also know that I may be ordered to make restitution to any victim(s) of my crimes, including any restitution that may be owed on charges that are dismissed as part of a plea agreement.

CONSECUTIVE/CONCURRENT PRISON TERMS. I know that if there is more than one crime involved, the sentence may be imposed one after the other (consecutively), or they may run at the same time (concurrently). I know that I may be charged an additional fine for each crime that I plead to. I also know that if I am on probation or parole, or awaiting sentencing on another offense of which I have been convicted or which I have plead guilty (or no contest), my guilty (or no

contest) plea(s) now may result in consecutive sentences being imposed on me. If the offense to which I am now pleading guilty occurred when I was imprisoned or on parole, I know the law requires the court to impose consecutive sentences unless the Court finds and states on the record that consecutive sentences would be inappropriate.

PLEA BARGAIN: My guilty (or no contest) plea(s) (is/are not) the result of a plea bargain between myself and the prosecuting attorney. All the promises, duties and provisions of the plea bargain, if any, are fully contained in this statement, including those explained below:

*State agree sentence may run
concurrent w/ Davis Co case*

TRIAL JUDGE NOT BOUND. I know that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing, made or sought by either defense counsel or the prosecuting attorney are not binding on the Judge. I also know that any opinions they express to me as to what they believe the Judge may do are not binding on the Judge.

DEFENDANT'S CERTIFICATION OF VOLUNTARINESS

I am entering this plea of my own free will and choice. No force, threats or unlawful influence of any kind have been made to get me to plead guilty (or no contest). No promises except those contained in this statement have been made to me.

I have read this statement, or I have had it read to me by my attorney, and I understand its contents and adopt each statement in it as my own. I know that I am free to change or delete anything contained in this statement, but I do not wish to make any changes because all of the statements are correct.

I am satisfied with the advice and assistance of my attorney.

I am 28 years of age. I have attended school through the 13 Grade. I can read and understand the English Language. If I do not understand English, an interpreter has been provided to me. I was not under the influence of any drugs, medication or intoxicants which would impair my judgement when I decided to plead guilty. I am not presently under the influence of any drug, medications or intoxicants which impair my judgement.

I believe myself to be of sound and discerning mind and to be mentally capable of understanding these proceedings and the consequences of my plea. I am free of any mental disease, defect, or impairment that would prevent me from understanding what I am doing or from knowingly, intelligently, and voluntarily entering my plea.

I understand that if I want to withdraw my guilty (or no contest) plea(s), I must file a written motion to withdraw my plea(s) prior to sentencing. I will be allowed to withdraw my plea only if I show good cause. Once I am sentenced, I lose my right to withdraw my plea.

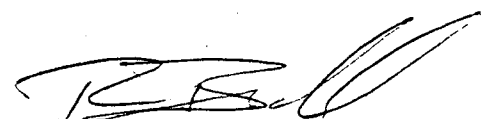
DATED this 6 day of August, 2009.



DEFENDANT

CERTIFICATE OF DEFENSE ATTORNEY

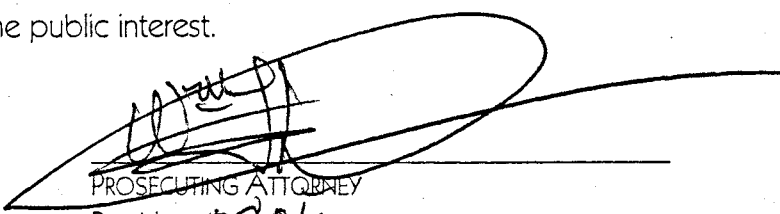
I certify that I am the attorney for _____, the defendant above, and that I know he/she has read the statement or that I have read it to him/her; I have discussed it with him/her and believe that he/she fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the defendant's criminal conduct are correctly stated; and these, along with the other representations and declarations made by the defendant in the foregoing affidavit, are accurate and true.



ATTORNEY FOR DEFENDANT
BAR NO. 8703

CERTIFICATE OF PROSECUTING ATTORNEY

I certify that I am the attorney for the State of Utah in the case against _____, defendant. I have reviewed this statement of defendant and find that the factual basis of the defendant's criminal conduct which constitutes the offense(s) is true and correct. No improper inducements, threats, or coercion to encourage a plea has been offered defendant. The plea negotiations are fully contained in the Statement and in the attached Plea Agreement or as supplemented on the record before the Court. There is reasonable cause to believe that the evidence would support the conviction of the defendant for the offense(s) for which the plea(s) is/are entered and that the acceptance of the plea(s) is/are entered and that the acceptance of the plea(s) would serve the public interest.


PROSECUTING ATTORNEY
BAR NO. 0304

ORDER

Based on the facts set forth in the foregoing Statement and the certification of the defendant and counsel, and based on any oral representations in Court, the Court witnesses the signatures and finds that defendant's guilty (or no contest) plea(s) is/are freely, knowingly and voluntarily made.

It is hereby ordered that the defendant's guilty (or no contest) plea(s) to the crime(s) set forth in the Statement be accepted and entered.

Dated this 6 day of April, 2009.


DISTRICT COURT JUDGE

Addendum B

IN THE DISTRICT COURT OF JUDICIAL DISTRICT NO. 2
WEBER COUNTY

STATE OF UTAH

FEB 02 2010

State of Utah,

plaintiff,

vs.

Kelly Davis,

Defendant.

Audio Transcript

Case No. 091901063

Plea Hearing

August 6, 2009

Honorable Michael D. Lyon

Appearances:

For the State: William F. Daines

For the Defendant: Ryan J. Bushell

FILED
UTAH APPELLATE COURTS

MAR 18 2010

Transcribed by Dean Olsen, CSR
847 E. 2800 N.
North Ogden, Utah 84414
(801) 782-3146

Hardcopy of Transcript of Plea Hearing held on 8/6/09



CD30833383

pages:

091901063 DAVIS, KELLY TYSON

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UTAH APPELLATE COURTS

FEB 03 2010

Original 7009091340

Ogden, Utah August 6, 2009

MR. BUSHELL: Kelly Davis, number 33, please.

THE COURT: State of Utah versus Kelly Davis.

MR. BUSHELL: Judge, we've reached a resolution in this matter. Mr. Davis is gonna plead guilty as charged to theft with a prior, third degree felony. The State's not going to oppose the sentence running concurrent with the year he's serving in Davis County Jail.

THE COURT: All right. Mr. Davis, is that your agreement?

MR. DAVIS: It is, your Honor.

THE COURT: You've had a chance to read the plea agreement prepared by Mr. Bushell. Did he answer your questions?

MR. DAVIS: He has.

THE COURT: And you understood the document.

MR. DAVIS: I do.

THE COURT: And you acknowledge that by pleading guilty, you waive your rights explained in that agreement.

MR. DAVIS: I do.

THE COURT: Do you feel pressure to plead guilty?

MR. DAVIS: No, sir.

THE COURT: Is your mind clear today that you understand what you're doing?

MR. DAVIS: It is, your Honor.

1 **THE COURT:** You understand that the sentence that I will
2 impose will be a prison commitment -- is that what I
3 understood?

4 **MR. BUSHELL:** No, no, he's doing a year in the Davis
5 County Jail.

6 **THE COURT:** Oh, I misunderstood. Excuse me. Okay.
7 Didn't mean to give you a panic attack, but --

8 **MR. DAVIS:** Mean my heart jumped out of my chest.

9 **MR. BUSHELL:** Mine, too.

10 **THE COURT:** But you understand that a prison commitment
11 is a possibility in this case. I don't wanna minimize this.

12 **MR. DAVIS:** No, no, not at all, your Honor.

13 **THE COURT:** Okay.

14 **MR. DAVIS:** Not at all.

15 **THE COURT:** All right. And you understand that I'm not
16 bound by recommendations.

17 **MR. DAVIS:** Yes, sir.

18 **THE COURT:** Factual basis please.

19 **MR. BUSHELL:** Do you want me to do it, Bill?

20 **MR. DAINES:** Yes.

21 **MR. BUSHELL:** Okay. Your Honor, the date alleged in the
22 Information, the defendant went into a 7-Eleven, I believe.
23 Took some items that were for sale, pair of sunglasses, I
24 believe, and some other items, and then left without paying
25 for those items. He -- sunglasses. He has twice previously

1 been convicted of theft.

2 MR. DAINES: That's correct, your Honor.

3 THE COURT: Do you agree with those facts?

4 MR. DAVIS: I do, your Honor.

5 THE COURT: Do you have any additional questions of your
6 lawyer?

7 MR. DAVIS: No.

8 THE COURT: Are you satisfied with his advice to you?

9 MR. DAVIS: I am, your Honor.

10 THE COURT: All right. To the charge then of theft with
11 priors, a third degree felony, how do you plead?

12 MR. DAVIS: Guilty, your Honor.

13 THE COURT: Okay. Did I unders -- All right. I'll
14 accept the plea and find that this plea is knowing and
15 voluntary. You have a right to make a motion to withdraw the
16 plea if it's made prior to sentencing. Did I understand that
17 the parties were going to ask for sentencing now or get a
18 presentence report?

19 MR. BUSHELL: I think we oughta do a PSI, your Honor.

20 MR. DAINES: I think that's correct, your Honor.

21 THE COURT: All right. Let's do a PSI. September 10th
22 will be sentencing. You're held pending sentencing.

23 MR. BUSHELL: Thank you, your Honor.

24 THE COURT: Thank you.

25 MR. DAVIS: Thank you, sir.

CERTIFICATE

STATE OF UTAH)
) SS
COUNTY OF WEBER)

THIS IS TO CERTIFY THAT THE FOREGOING FOUR PAGES OF
TRANSCRIPT CONSTITUTE A TRUE AND ACCURATE RECORD OF THE
PROCEEDINGS TO THE BEST OF MY KNOWLEDGE AND ABILITY AS A
CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF UTAH.

DATED AT OGDEN, UTAH THIS 26TH DAY OF JANUARY, 2010.

Dean Olsen

DEAN OLSEN, CSR

Addendum C

FILED

JAN 08 2010

SECOND
DISTRICT COURT

IN THE SECOND JUDICIAL DISTRICT COURT,

WEBER COUNTY, STATE OF UTAH

-o0o-

JAN 08 2010

STATE OF UTAH,

Plaintiff,

vs.

KELLY TYSON DAVIS,

Defendant.

Case No. 091901063

SENTENCING

-o0o-

BE IT REMEMBERED that on the 15th day of September, 2009, commencing at the hour of 9:35 a.m., the above-entitled matter came on for hearing before the HONORABLE SCOTT M. HADLEY, sitting as Judge in the above-named Court for the purpose of this cause, and that the following proceedings were had.

-o0o-

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UTAH APPELLATE COURTS

~~FEB 08 2010~~

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MAR 18 2010

(Hard Copy) Transcript from 09/15/09 Sentencing



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091901063 DAVIS, KELLY TYSON



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A P P E A R A N C E S

For the State:

L. DEAN SAUNDERS
Attorney at Law

For the Defendant:

STEPHEN A. LAKER
Attorney at Law
2562 Washington Boulevard
Ogden, Utah 84401

* * *

P R O C E E D I N G S

(Transcriber's Note: Speaker identification

may not be accurate with audio recordings.)

THE COURT: Other matters, Mr. Laker?

MR. LAKER: Can we call Kelly Tyson Davis, your Honor? No. 2.

THE CLERK: State of Utah vs. Kelly Tyson Davis, Case No. 091901063. Time set for Adult Probation & Parole sentencing.

MR. SAUNDERS I'm sorry? Who did you just call?

THE CLERK: No. 2, Kelly Tyson Davis.

THE COURT: Davis.

MR. LAKER: I'm not sure why, but this was moved to your Honor, and I've got notes in here from Ryan Bouwhuis with regard to, you know, and that type of thing and--and the plea negotiation with regard to this.

THE COURT: The only reason I know is, I think he was on probation to this Court or something.

MR. LAKER: Okay.

THE COURT: And so they moved him here, but--

MR. LAKER: Uh huh (affirmative). That's probably--

MR. SAUNDERS: Has there been a probation violation

filed or anything?

MR. LAKER: I don't think so.

THE COURT: Not--not that I'm aware of, so...

MR. LAKER: I don't think there has been a probation violation.

THE COURT: I think it was just referred, like a week or two ago.

MR. SAUNDERS: Don't we want to get those together?

MR. LAKER: Pardon?

MR. SAUNDERS: Don't we want to get those together?

MR. LAKER: Yeah. Here.

MR. SAUNDERS: So, we can handle it at the same time?

MR. LAKER: Yeah. We're handling it here, that's why we're here.

MR. SAUNDERS: Yeah. Don't we want to have the probation case here as well, though?

MR. LAKER: Oh, I don't know that there is a probation case. He had a--he had a Davis County case, your Honor, that actually--

THE COURT: Do we have another case, Kristy?

MR. LAKER: --happened after this one.

THE COURT: Right.

THE CLERK: September 10th (inaudible) said defense counsel represents the defendant, is currently on Court

probation to Judge Hadley and they requested it be--be continued and be heard before you, because of the court probation.

THE COURT: Okay. And do we have another case then with it? At least they think we do, huh?

While she's looking, is Mr. Davis in the Davis County drug court program at this point?

MR. LAKER: No.

MR. DAVIS: No, your Honor. Actually, you recommended in November, if you recall, back in November of last year, you ordered him in drug court and actually, it was Morris who ordered it and then you went--concurred with it and I didn't qualify 'cause I had a pending case. So, I was at Rainbow for two months, trying to qualify, and finally, once I was able to qualify, this one then popped up, which actually happened before and one I've already been sentenced on.

So, I really want to enter it, I mean, it would have been a good opportunity for me.

THE COURT: Okay.

MR. DAVIS: So, that's--that's where that--

MR. SAUNDERS: But he didn't qualify at that time.

MR. DAVIS: No.

MR. LAKER: Because of this pending case.

MR. DAVIS: Because of this charge, yes.

THE COURT: Yeah.

THE CLERK: It's a retail theft, he was sentenced before you on November 18th of '08, and sentenced to court probation.

THE COURT: Okay. And for what period of time?

THE CLERK: Probation ends November 15, 2011.

THE COURT: Okay. So, a three-year court probation.

That was--oh, and all--all--the only condition was probably to follow what Judge Morris had ordered, I'm assuming.

MR. LAKER: Well, and what--and what Judge Morris and the Davis County Court, they gave him a year.

THE COURT: Thinking he would go into drug court. Okay.

MR. LAKER: They gave him a year because of this pending case.

THE COURT: Okay. So, that's probably why there's not an affidavit there, there's--he couldn't--while he's on court probation, so, I guess it would be your office that would file it, but it kinda doesn't make sense because he was ordered to do drug court, which he didn't--ended up not qualifying for.

But we probably do need to something with that case to get it back on track, 'cause it--

MR. LAKER: And when he did plead in--in--on this, he--the State recommended concurrent sentencing with Davis

County.

MR. SAUNDERS: That's correct, we did recommend that it--this run concurrently with Davis County. We didn't agree to recommend that whatever their sentence was, it would be the sentence we'd recommend in this case.

THE COURT: Right. Okay.

MR. LAKER: But they did recommend a year and he's serving a year now, your Honor, which would be longer than, probably actual time would probably serve longer than he would if you followed the recommendations and sent him to prison.

THE COURT: Well, but that's where this recommendation had me a bit confused, in that this recommendation recommends prison.

MR. LAKER: I know.

THE COURT: And the one that they had two months ago, which was by the same probation officer and that probation officer, knowing of this pending charge, recommended probation.

MR. LAKER: And--and I don't under--I don't understand that at all, either, because this charge actually pre-dates--

MR. SAUNDERS: The matrix changed, the matrix changed, that's probably why, 'cause the matrix, I think, in this one, recommended imprisonment.

THE COURT: It does.

MR. SAUNDERS: And--and that--the matrix changes with each conviction. So, that's why.

THE COURT: But--but he would have known that, that's the only thing--

MR. SAUNDERS: It doesn't matter, because the old matrix didn't recommend prison.

THE COURT: It just seems odd to kind of get him started in a program and then two months later, recommend against it, but I--I--

MR. SAUNDERS: But--but he was on probation--

THE COURT: That is what's happened, you're right.

MR. DAVIS: I do apologize, your Honor, I wasn't able to enter it because I think it would have been a good opportunity for me and I need help.

THE COURT: It would have been good, yeah. Okay. Your thoughts, Mr. Laker, then?

MR. LAKER: Your Honor, I would ask your Honor to--to do what--what we anticipated, what Mr. Bouwhuis anticipated, that you run this concurrent with the sentence out of Davis County and that is that he serve a year, that he--he be given credit for the time that he's served and--and then get into the programs that they're contemplating there.

THE COURT: And--and what do we do about the court probation case that--that we have in this Court?

MR. LAKER: Well, I--I would think that that would--

that would be something that would go concurrent with it as well.

THE COURT: Okay. And does he agree with the amount of restitution recommended here?

MR. LAKER: The restitution is--

THE COURT: Twenty-nine ninety eight.

MR. LAKER: --twenty-nine--yeah. Twenty-nine ninety eight, we don't have a problem with that.

THE COURT: Okay.

Mr. Davis, anything you would like to say before sentence is imposed?

MR. DAVIS: Yes, your Honor. I just want you to know I do apologize for not entering the program, I think it would have been a good opportunity for me. A lot has happened since then with these past months in jail, to say the least it's pretty frustrating and I brought this upon myself and I can't blame anyone but myself, but I mean, I've written letters to all my friends, telling them not to write me, don't call my house, I can't continue living that lifestyle, I don't want nothing to do with it, I just (inaudible) that I meant for, just I want to get this over with and get on with my life.

THE COURT: Okay.

Mr. Saunders?

MR. SAUNDERS: Your Honor, we think the

recommendation for prison is appropriate. He's been given the change of probation before and was terminated unsuccessfully.

At the time, after he committed the offense that he's apparently on court probation for, he committed this offense, so, he just keeps committing offenses, even when he's been charged and on probation for other offenses.

We think that the--the appropriate recommendation in this case is prison, your Honor.

MR. LAKER: But this pre-dates, your Honor, the--the actual being on probation for that.

THE COURT: The--the date of--

MR. LAKER: It happened--

THE COURT: The date of the offense--

MR. LAKER: The date--

THE COURT: --was prior to that.

MR. LAKER: Correct.

MR. DAVIS: Apparently in 2007, too, that probation was revoked and re-started with a zero tolerance condition.

THE COURT: Which one was that? Was that the one here?

MR. SAUNDERS: It's a 021701125.

THE COURT: You'd better look at up.

MR. SAUNDERS: Yeah. If I'm reading this correct, it was started in 2002--

THE COURT: Can you look that one up?

MR. SAUNDERS: --and in 2005, it was revoked--oh, no, let's see. He was convicted. In 2005, he was con-- (inaudible) serve 24 months' probation, that probation was revoked, been sentenced anew, committed anew.

If you read on Page 6, that's where I'm getting that information, of the addendum.

THE COURT: And where does it say zero tolerance?

MR. DAVIS: That second paragraph. In 2007, the defendant violated his probation, his probation is revoked and re-started with zero tolerance.

THE COURT: Wow. Is that what it says?

MR. DAVIS: Yeah.

THE CLERK: Oh, we're--I'm sorry. We're looking at Case No. 2182?

THE COURT: No. 1125. That doesn't look like one of ours. I think that's a Davis County case.

MR. SAUNDERS: I'm just trying to go through--that's a Davis County case.

MR. LAKER: That's a Davis County, your Honor.

THE COURT: Yeah. Okay.

MR. SAUNDERS: So,--

THE COURT: Never mind.

MR. SAUNDERS: --I can't find the one that he's on court probation here for.

THE COURT: That zero tolerance threw me.

Okay. Anything else from the State?

MR. SAUNDERS: No, your Honor.

THE COURT: Mr. Laker, anything else from your standpoint?

MR. LAKER: No, your Honor.

THE COURT: Okay. Any legal reason why sentence cannot be imposed?

MR. LAKER: No, your Honor.

THE COURT: Okay. I'll do the following, Mr. Davis. In connection with your conviction of a third-degree felony, retail theft, that you be sentenced to the Utah State Prison for one indeterminate term of zero to five years and that you pay restitution in the amount of \$29.98 to 7-Eleven. You may have credit for the time that you've served and that may run concurrent with any other sentence that you are serving.

Okay. Thank you, Mr. Davis.

MR. SAUNDERS: Are you sending him to prison currently, your Honor, instead of the--the 365 days?

THE COURT: Yes. Yeah. I think the probation hasn't been successful and it's been tried many times.

MR. DAVIS: Your Honor, I would ask that if--I mean, when I--you know, I say that (inaudible) drug court program, there was no--never given the opportunity, I couldn't qualify because this was pending.

THE COURT: Well, that's--that's not what I'm

counting as unsuccessful, it's the other probation attempts that you've had.

MR. DAVIS: Out of Davis County?

THE COURT: Uh huh (affirmative).

MR. DAVIS: Well, I want you to know, your Honor, I won't let you down, I--I won't.

MR. LAKER: If you'll give him an opportunity, your Honor.

MR. DAVIS: I--if you'll give me the opportunity, I won't let you down. I am so committed right now, I--I--

MR. SAUNDERS: We have no rec--we have no objection to the Court recommending drug board, your Honor, if you feel like that's appropriate.

THE COURT: I--I'm fine with that, recommending drug board at the prison, but I think the recommendation is well-founded, Mr. Davis. I'm sorry.

MR. DAVIS: There's no possibility of--I mean, after staying the past five months in jail, just--a lot has changed. I mean, I don't use--you've probably heard a lot of this same type of thing, but I mean, I'm just--I've cut all my ties, I've just--I've written letters to friends saying that if you're going to continue living this lifestyle, I don't want nothing to do with you. I mean, I--I've just--I've made a lot of changes to myself, I really have. And I just--when I was given that opportunity to go to drug court, I was excited, I

really was. I was like, I knew it was a good opportunity for me and when I--when I wasn't able to qualify, I just--I was kind of in limbo, I guess I didn't know--

THE COURT: Well, and you don't get--about the only other opportunity I have to give to you as far as drug treatment is drug board and so that's--that's what I hope you get.

Okay. Thank you, Mr. Davis.

MR. DAVIS: So, there's no other--no other possibility from you, sir?

THE COURT: I don't see it, Mr. Davis. I think the--I think the recommendation is well-founded, it makes sense to me.

MR. DAVIS: It makes sense to you?

THE COURT: Uh huh (affirmative). I'm sorry. I hope you do well.

Other matters, Mr. Laker?

MR. LAKER: No, your Honor, I--that's all I had.

(Whereupon, this hearing was concluded.)

* * *

TRANSCRIBER'S CERTIFICATE

STATE OF UTAH :
 : SS.
COUNTY OF SALT LAKE :

I, Toni Frye, do hereby certify:

That I am a Certified Court Transcriber of Tape Recorded Court Proceedings; that I received the electronically recorded files of the within matter and have transcribed the same into typewriting, and the foregoing pages, to the best of my ability, constitute a full, true and correct transcription, except where it is indicated the Electronically Recorded Court Proceedings were inaudible.

Dated this 14th day of JANUARY, 2010.

Toni Frye
Toni Frye, Transcriber

I, RENEE L. STACY, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public for the State of Utah, do hereby certify that the foregoing transcript, prepared by Toni Frye was transcribed under my supervision and direction.

Renee L. Stacy
Renee L. Stacy, CSR, RPR

My Commission Expires:

11-9-2011

